

United States
Circuit Court of Appeals
For the Ninth Circuit.

WALTER B. MITCHELL, Appellant,

vs.

THE LELAND COMPANY, a Corporation,
FRANK LINN and THEODORE LELAND, Appellees.

Brief of Appellees

Upon Appeal from the United States District Court
for the District of Montana.

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This suit was originally brought as an equitable action to compel the defendant corporation to transfer upon it's books fifty shares of stock of the corporation to the plaintiff. Later by stipulation the plaintiff was permitted to file an amended complaint and he did so but changed the nature of the action to one at law for the conversion of the stock.

Upon the trial it appeared to the court that the action for conversion was barred and the action was tried as if it were an equitable action and as though upon the cause set out in the original complaint. (Tr. 58).

From the testimony given at the trial it is shown that the certificate of stock was transferred to E. C. Murphy by S. O. Leland in a trade for some real estate in March, 1912 and that in May, 1912, he and Murphy entered into a written contract for the return of the certificate to Leland upon the transfer of the real property to Murphy by Leland. (Tr. 76). This contract is set forth in the Transcript at pages 53, 54, 55.

This agreement was carried out and S. O. Leland completed his contract with Murphy and Murphy delivered the certificate to him but upon the refusal of Leland to pay other money Murphy grabbed the certificate, and thereafter upon demand for it by Leland Murphy assured him it was lost. (Tr. 77).

The certificate had never been presented by Murphy for transfer on the books of the corporation and the trial court held properly that any right or title of Murphy in the certificate was transferred back to Leland and that he obtained no title thereto by his act of trespass in seizing it after it's delivery to Leland. See Memorandum Opinion of District Court Transcript page 56.

Murphy thereafter had no interest in the certificate

that he could assign and of course the plaintiff obtained no interest by the assignment to him. And in passing it is well to observe the multiplicity of assignments all apparently designed to further an attempt to get five thousand dollars of corporate stock for an alleged debt of one hundred dollars. E. C. Murphy assigned his interest in the contract with Leland to one John E. Murphy on June 20, 1912, as set forth in the complaint which is a part of the judgment roll introduced by the plaintiff as an exhibit. (Tr. 39). And if it should be argued that E. C. Murphy had a right to retain the stock certificate, taken as it was by him tortiously, as security to enforce the payment of the hundred dollars alleged to be due him from S. O. Leland for the piano as mentioned in the contract, then it must be noted that the assignment of a contract or instrument for the payment of money carries with it the incident of the security and therefore of course E. C. Murphy, even under such theory, untenable as it is, had no interest in the certificate to assign to A. Coolin, plaintiff's assignor, on May 22, 1913, the date plaintiff avers such assignment was obtained by Coolin "for the purpose of clearing up any rights or interest that E. C. Murphy had in said stock". (Tr. 21). And no assignment of the stock was ever obtained from John E. Murphy. And any lien of E. C. Murphy on the certificate—even assuming that he could obtain a lien by his act of trespass in regaining possession of the certificate—would be waived by the surrender of it to the Sheriff and the attempted and purported levy upon it under the writ of execution from the Superior Court of Spokane county, Washington.

So the whole matter resolves itself into the question whether the purchaser at the so-called execution sale of the certificate at Spokane, obtained thereby any owner-

ship of the shares of stock in the defendant corporation represented by the certificate.

It is essential to a clear view of the question that the nature of shares of stock and stock certificates be kept in mind.

“A certificate of stock is from one point of view a mere muniment of title, like a title deed. It is not the stock itself, but evidence of the ownership of the stock; that is to say, it is a written acknowledgment by the corporation of the interest of the stockholder in the corporate property and franchises. It operates to transfer nothing from the corporation to the stockholder, but merely affords the latter evidence of his rights. It should be clearly understood that THE CERTIFICATE IS NOT THE STOCK but merely written evidence of the ownership of the stock.”

Cook Corporations, 8th ed. Vol. 1, Sec. 13.

“Broadly speaking, a share certificate is merely the paper representative of an incorporeal right of a stockholder. It stands on a footing similar to other muniments of title. In other words, the act of subscribing for the shares gives title to the subscriber, and the certificate neither constitutes nor is necessary to it; it is only evidence of title.”

Thompson Corp. 2nd. Ed. Vol. 4, Sec. 3455.

Cotter vs. B. & R. V. S. Co., 31 Mont. 129.

With the distinction clear in mind between the shares of stock and the certificate which is the evidence of the ownership of the shares, the next question to consider is where is the situs of such shares of stock for the purpose of determining how, and where levy thereon may be made by creditors.

The Supreme Court of the United States has held that “the certificates are only evidence of the ownership of the shares and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicile of the company is and must be in the state that created it,

the property represented by the certificates of stock may be deemed to be held by the company within the state whose creature it is, whenever it is sought by suit to determine who is the real owner."

Jellenik vs. Huron C. M. Co., 177 U. S. 1; 44 L. Ed. 647.

The statutes of Montana prescribe how stock in it's corporation may be levied upon by attachment and execution.

"Stocks or shares, or interest in stocks or shares of any corporation or company must be attached by leaving with the president or other head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached in pursuance of such writ."

Sub. 4 Sec. 6662 Rev. Codes Montana, 1907.

And the statute provides that shares and interests in corporations may be levied upon under execution in like manner as provided for attachment.

Sec. 6821 Rev. Codes Montana, 1907.

"The authority of the state to establish such regulations in reference to the stock of a corporation organized and existing under it's laws cannot be doubted."

Jellenik vs. Huron C. M. Co., 177 U. S. 1; 44 L. Ed. 647.

The power of the state of Montana to enact such laws regulating the manner in which stock in it's corporations may be levied upon by execution is declared by the Supreme Court of the United States in the above decision.

When the statute prescribes a mode of levy upon shares of stock in a corporation the mode prescribed must be substantially followed or the sale will be void, and the purchaser will get no title.

Thompson Corp. Sec. 5842.

Wells vs. Price (Idaho) 56 Pac. Rep. 266.

Ellis vs. Gibbons (Colo.) 145 Pac. Rep. 285.

And in the absence of statute shares of stock in a corporation are not subject to execution.

Cook Corp. Sec. 480.

Indeed counsel has not cited any statute of the state of Washington providing the mode of levy upon stock in a corporation and he has cited no statute of Washington authorizing the levy of an execution upon shares of stock in a foreign corporation.

The Washington court said in a case decided in 1902, "We have no law in this state authorizing the sale of the stock of stockholders of a foreign corporation doing business in this state on an execution issued on a judgment in this state against the stockholders of such foreign corporation."

Daniel vs. Gold Hill M. Co., 68 Pac. Rep. 884.

And the court held in the same case that stock in a corporation cannot be seized on execution and sold unless authorized by an express statute, and where such sale is authorized, the authority only extends to the stock of the corporations existing in that state and not to those of other state.

The statute of Washington authorizing the sale of stock in domestic corporations is very like the statute of Montana cited above.

"Shares of stock cannot be taken on execution or attachment by levying upon or seizing the certificate of stock, and a court can acquire no jurisdiction over stock by virtue of an attachment merely because the certificate of stock is within it's jurisdiction."

Clark & Marshall Private Corp. Sec. 378h.

It seems so clear that the process of the court of the state of Washington cannot reach beyond the confines of that state into Montana and seize Montana property that to multiply citations is needless. The authorities cited by counsel are not in point. When a certificate of stock is

pledged as security or collateral or held under an agreement for a lien thereon any sale made of it by the one holding it under such agreement is made under an agreement. The stock is sold under authority from the owner. But in the case of sale under an execution the owner does not voluntarily part with his stock or authorize its sale. The strong hand of the law reaches out and seizes it without his consent and in so doing the mode prescribed by law must be followed or the purchaser gets no title. The cases cited by counsel appear to be cases, where even remotely bearing upon the point, of certificates of stock sold to satisfy liens or sold by pledge holder or sold where held as collateral.

It is contended that the court erred in permitting S. O. Leland to testify to the transaction between him and E. C. Murphy involving the stock certificate and the reasons assigned are that such testimony constituted an impeachment of the judgment of the court of Spokane county, Washington. The mere statement refutes the contention. The judgment in question purports to adjudge that S. O. Leland at the time of the rendition of the same was indebted to John E. Murphy, assignee of E. C. Murphy, in the sum of \$105.50 and \$17.00 costs. It is simply a money judgment and how the testimony of S. O. Leland impeached it in any way is beyond comprehension. It is also contended that the testimony was a surprise to the plaintiff. The answer of defendants to the amended complaint sets forth the fact of the rescission of the contract whereby Leland traded the stock to Murphy for certain real and personal property and alleges fully that from the time of the making of the contract of rescission about May 1st, 1912, Leland again became the owner of the stock. So there was no surprise and in any event the law is well settled that where the plaintiff to recover must

prove his ownership of personal property the defendant may introduce any testimony rebutting such proof of ownership; he may prove ownership in himself or in another person and the plaintiff must recover on the strength of his own title. This is true in actions of replevin and conversion and in actions like the case at bar. It is the rule of decision and practice in Montana that any fact going to defeat plaintiff's claim of ownership may be proved even under a general denial. In this case though the facts were pleaded in the answer.

Gallick vs. Bordeaux, 22 Mont. 470; 56 Pac. 961.

Kaufman vs. Cooper, 38 Mont. 6; 98 Pac. 504.

The findings and decision of the trial court were made after hearing the testimony in full, the transcript showing only the barest syllabi of it. The appellant has shown no reason for a reversal of the decision. The burden is, of course, upon him to show some prejudicial error affecting his substantial rights. None has been shown and it is respectfully submitted that the judgment should be affirmed.

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